

RECEIVED

JUL 18 2000

ORIGINAL

Before The
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

| | | |
|--------------------------------|---|---------------------|
| In the Matter of |) | MM Docket No. 00-41 |
| |) | |
| Amendment of Section 73.202(b) |) | RM-9369 |
| Table of Allotments |) | |
| FM Broadcast Stations |) | |
| (Oakville, Raymond and |) | |
| South Bend, Washington) |) | |

To: Chief, Allocations Branch
 Policy and Rules Division
 Mass Media Bureau

OPPOSITION TO MOTION TO STRIKE

On September 30, 2000, a Supplement to Reply Comments was filed in this proceeding by 3 Cities, Inc ("3 Cities") In that filing, 3 Cities noted that it was necessitated and directed at new facts that had been submitted by Jodesha Broadcasting, Inc ("Jodesha") for the first time in its Reply Comments, facts that should have been included in its original Petition for Rulemaking but that had been conspicuously absent there. 3 Cities included in its pleading a request for leave to submit the required Supplement and indicated its reasons in support of the filing.

In its Motion to Strike, Jodesha cites Rule 1.415(d) and in so doing specifically recognizes that supplemental pleadings may be filed when "authorized by the Commission". The fact is that the Commission at all times has the discretion to accept additional pleadings to assure a complete record, and where basic fairness to a party requires such action. see e.g. South Congaree and Batesburg, South Carolina, 5 FCC Rcd 7480(1990), Live Oak and St. Augustine, Florida, 4 FCC Rcd 758 (1989), Miami, Montgomery

No. of Copies rec'd 074
 List A B C D E

and Kermit, West Virginia, Report and Order in Docket 84-31, rel. May, 1985. There is simply no question that the Commission may accept a supplemental pleading where the fact situation warrants acceptance and consideration, as it does here.

In the instant case, we are dealing with a proponent of a rulemaking allocation who submitted virtually no facts as to its proposed city of allocation, where the submission of such facts in the first instance, in the first filing, is an a priori essential submission necessary to allow the FCC to perform its statutory function to make new allotments to recognized cities and communities that meet the FCC standard for being recognized as such a city or community.

In its Comments in Opposition, 3 Cities noted the absence of such required information and argued the law that applied in such situations, that prior FCC cases required rejection of such an alleged community that had not been shown to include the basic characteristics of a "community" as recognized and required by the FCC. See e.g. Pleasant Dale, Nebraska, DA 99-2246 (1999).

In Reply, rather than argue that the applicable law was different than cited by 3 Cities, Jodesha simply took the more expedient route of supplying, for the first time in the proceeding, pages of new "facts" meant to buttress its position. 3 Cities had never seen these allegations before and had had no prior opportunity to review or respond to them. Having no prior warning of such a burden of new factual allegations, 3 Cities did its best to undertake and prepare a response to the new material.

The point is that if Jodesha is looking for someone to complain about on this, it need only look to itself, for it was Jodesha that chose not to submit required and essential factual information with its original proposal, and it is Jodesha that chose to sit back and hope for a decision in its favor, and then, only when that was challenged, to seek to parry with an offer of more evidence. It is a classic course of conduct recognized, addressed, and disdained by the Court of Appeals in Colorado Radio Corp v. FCC, 118 F.2d 24, 26 (D.C.Cir 1941), as it should be here.

The existing record of this proceeding provides more than ample evidence of Jodesha's failure to submit required facts as well as required commitments, only to seek to insert them at the last minute in its Reply, and only after caught red-handed in its patent and dispositive deficiencies.

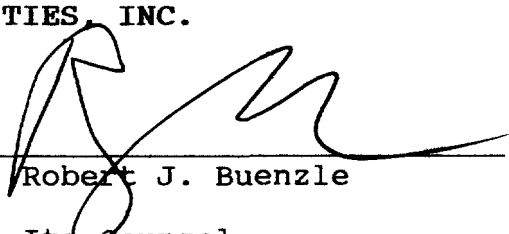
In sum, the Supplement to Reply filed by 3 Cities was required by the very actions and deficiencies of Jodesha and Jodesha is in no position to complain about problems it has itself caused. Its Motion to Strike has no merit and should be denied. 3 Cities' Supplement should be accepted and, when considered along with the prior pleadings by 3 Cities, provides more than ample basis to reject and dismiss the Jodesha proposal.

Wherefore, 3 Cities, Inc. respectfully submits that there is good cause to accept and fully consider the "Supplement to Reply Comments" in this proceeding, and that the Jodesha Motion to Strike is without merit and should be denied.

Respectfully submitted,

3 CITIES, INC.

by



Robert J. Buenzle

Its Counsel

Law Offices
Robert J. Buenzle
12110 Sunset Hills Road
Suite 450
Reston, Virginia 22090
(703) 715-3006

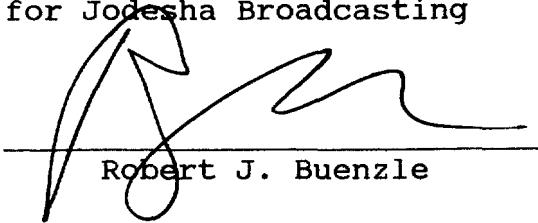
July 18, 2000

CERTIFICATE OF SERVICE

I, Robert J. Buenzle, do hereby certify that copies of the foregoing Opposition To Motion To Strike have been served by United States mail, postage prepaid this 18th day of July, 2000, upon the following:

* Sharon P. McDonald, Esq.
Federal Communications Commission
Allocations Branch, Mass Media Bureau
Portals II, Room 3-A247
445 12th Street S.W.
Washington, D.C. 20554

David Tillotson, Esq.
4606 Charleston Terrace, N.W.
Washington, D.C. 20007
Counsel for Jodesha Broadcasting



Robert J. Buenzle

* Hand-delivered